

whether licensees should be free to use ATV spectrum for other purposes during an interim period.

A. The Commission Has Legal Authority To Provide Supplemental Spectrum To Existing Licensees Without Comparative Hearings.

In its Notice, the Commission expresses the initial view that it has the legal authority to grant additional spectrum to incumbent licensees for ATV service without considering competing applications or conducting comparative hearings. CBS agrees with the Commission's analysis.

In Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945), the Supreme Court held that Section 309 of the Communications Act required the Commission to conduct a comparative hearing before deciding among duly-filed mutually exclusive applications for a broadcast license. The Court did not, however, hold that competing applications must be permitted for every authorization or allocation of broadcast facilities. Indeed, the Court expressly noted that the Commission may limit the circumstances in which competing applications may be filed, when such limitations are justified by public interest concerns.*

* 326 U.S. at 333. See also United States v. Storer, 351 U.S. 192 (1956).

Over the years, the Commission has restricted the filing of competing applications in various contexts "in order to provide certainty, to avoid disruptions in the processing procedures for high demand services or to further other compelling public interest objectives."*

For example, the Commission concluded that a limitation on competing applicants for upgraded FM and UHF facilities was justified by the substantial interest in "encourag[ing] licensees to upgrade their facilities [and thereby] provide better service to their audience without the cost and delay of a comparative hearing."**

Further, the Commission has not permitted competing applications in connection with the authorizations of various new or expanded uses of broadcast facilities such as the vertical blanking interval,*** and in the allocation of portions of spectrum to particular categories of licensees for specialized purposes, such as one-way paging and cellular services.****

* FM Application Processing, 58 R.R. 2d 776, 780 (1985).

** Modification of FM and Television Station Licenses, 56 R.R. 2d 1253, 1257 (1984).

*** See, e.g., Offering of Data Transmission Services on the Vertical Blanking Interval by TV Stations, 101 F.C.C. 2d 973 (1985); Transmission of Teletext by TV Stations, 48 Fed. Reg. 27054 (1983); Use of Subsidiary Communications Authorizations, 48 Fed. Reg. 28145 (1983).

**** See, e.g., Cellular Communications Systems, 86 F.C.C. 2d 469 (1981); MCI Airsignal International, Inc., FCC 84-397 (released August 17, 1984).

In these cases, the Commission found that the public interest in encouraging licensees to provide an enhanced service outweighed the interests generally to be served by permitting competing applications and, indeed, that to permit competing applications would hinder and perhaps foreclose the development of these services. This is precisely the situation here.

As the Commission has recognized, it is strongly in the public interest to permit delivery of the highest quality television images and sound by terrestrial broadcasters. Over-the-air broadcasting currently provides to virtually all homes in America, without charge, a unique blend of national and local news, entertainment, information, education and sports programming. If unable to provide ATV quality, this universal, free, locally based service would soon be at a grave technological disadvantage as against those who provide competing ATV programming services for pay.* The result, CBS is convinced, would be a severe deterioration in terrestrial broadcasting's economic viability and, necessarily, in the quality of its service to the public.

As discussed above, and as the Commission has noted,** there is considerable doubt whether broadcasters will be able to achieve an ATV system of competitively high technical quality within

* NOI, ¶2.

** Further Notice, ¶86.

current 6 MHz spectrum allocations. If such an approach proves infeasible, it will be incumbent on the Commission -- as the Commission recognizes -- to provide broadcasters sufficient additional spectrum to enable them to compete effectively, rather than decline into technological second-class status and obsolescence.

Clearly, such allocation of additional spectrum to enable ATV transmission by current broadcasters would be stymied if the Commission were to permit competing applications for the spectrum. The uncertainties, costs and delays inherent in comparative proceedings would inevitably operate to frustrate the upgrading of existing broadcasters' service to ATV.*

Any additional spectrum allocated to licensees to enable ATV broadcasting should be considered to be an integral part of the licensee's frequency assignment.** This is true whether the additional allocation is 3 MHz, 6 MHz, or more, and whether it is contiguous to or separate from current allocations. It is

* On the record before the Ashbacker court, there was "no suggestion, let alone a finding, by the Commission that the demands of the public interest [are] so urgent as to preclude the delay which would be occasioned by a hearing." 326 U.S. at 333. CBS believes that the record in this proceeding would not be deficient in this regard.

** The Commission has never suggested that because a 6 MHz broadcast channel can be divided into six 1 MHz channels, an applicant could compete for a part of a broadcast frequency assignment when it comes up for license renewal. Such a regime would disrupt any allocation plans that the Commission may adopt and would undermine the very authority of the Commission to regulate the spectrum.

also true whether the supplemental spectrum is to be used not for an augmentation signal, but rather for a separate ATV signal to be simulcast by the existing licensee. If that scenario occurs, it would be because the ATV standard chosen was not NTSC-based, so that simulcasting would be relied upon to ensure that the present audience of free over-the-air NTSC television would continue to be served during a transition to ATV.

In any case, the grant of spectrum to enable ATV transmissions -- through augmentation or simulcasting -- should be considered an indivisible part of the licensee's assignment, since the supplementary allocation would be earmarked, and intended, solely to permit the technical improvement of a current program service.*

Competing applicants or petitioners to deny would, of course, remain free to challenge the entire allocation at renewal time. In this way, the same broadcast structure that now exists can be maintained and the same rights of challengers to a hearing on competing applications can be preserved, while encouraging technical change in the existing terrestrial broadcasting service.

* This would be true even if, as discussed below, the Commission decides to enable alternative uses of additional spectrum during an interim, transitional period.

B. The Commission Should Not Decide Allotment Methodology Or Flexible Use Issues At This Time But Should Await More Information On The Availability Of Appropriate Spectrum.

The Commission asks for comment on various approaches to allocating additional spectrum among licensees. The Commission notes that difficult issues may emerge regarding allotment methodology if it proves infeasible to provide sufficient additional spectrum to all licensees, in all or certain markets, or if certain spectrum is more desirable than other spectrum.

In CBS's view, decisions on these issues should await further testing and an informed determination concerning the need for and availability of additional spectrum to permit ATV broadcasting. It may be, for example, that further research will demonstrate that the needs of every licensee can be accommodated through available spectrum and that an equitable allocation scheme can be readily devised, without recourse to lotteries, hearings, or auctions and without need to permit private negotiations and arrangements. Even if a national allotment scheme proves inadequate, a choice between competing allocation methods should clearly await further clarification of the specific problems and issues.

Similarly, CBS believes that it would be prudent for the Commission to wait until ATV system requirements and the amount

of available spectrum are better known before addressing whether to permit post-allotment adjustments of spectrum allocations for ATV purposes and, if so, in what circumstances and to what extent such adjustments should be allowed. In any case, private negotiation of service areas or allowable interference has implications well beyond this proceeding, and, if it is to be considered at all, should be considered in a broader context.

The Commission also raises questions regarding possible "flexible use" of spectrum allocated for ATV purposes during an interim transition period. Again, CBS believes that resolution of these issues should await the testing and research that will more conclusively demonstrate the need for and nature of additional spectrum allotments. It should be noted, however, that to allow non-ATV, revenue-producing uses of supplementary spectrum might tend to slow the introduction of ATV.

Conversely, a "use-it-for-ATV-or-lose-it" approach would tend to encourage prompt institution of ATV service, as long as a reasonable time limit were established that allowed for variations in market conditions. In general, CBS is of the view that spectrum allotted for broadcast use should not be authorized for use for other purposes, and "flexible use" of ATV spectrum -- if allowed at all -- should be strictly limited in time.


CONCLUSION

The Further Notice is an important milestone on the road to timely implementation of a terrestrial ATV broadcast service in this country. The Commission's tentative findings reflect the Commission's strong commitment to the goal of allowing existing licensees to provide competitive quality ATV free to their over-the-air audiences, and those findings will serve to stimulate and focus the activity of the Advisory Committee, industry organizations, and ATV system proponents. The crucial period of system testing and expanded research into spectrum availability is soon to begin, and the Commission should press for expeditious results that are sufficient to base the spectrum allocation and standards decisions that will be necessary.


Respectfully submitted,

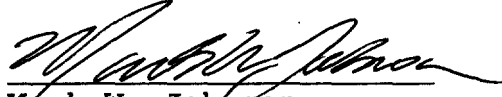
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